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IN THE

Supreme Court of the United States

October Term, 1964

No. 105

HARRY SCHACKMAN and HARRY GREENWALD,

Defendants and Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Respondents.

JURISDICTIONAL STATEMENT (RULE XIII(2)) RULES ON APPEAL.

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HARRY SCHACKMAN and HARRY GREENWALD,

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PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Respondents.

JURISDICTIONAL STATEMENT (RULE XIII(2)) RULES ON APPEAL.

(a) This is a joint appeal taken from the order of the Appellate Department of the Supreme Court[1], County of Los Angeles, reversing each defendant's conviction in part, and affirming the convictions in part (See Memorandum Opinion, Appendices A and B).

(b) The jurisdiction of this Court is invoked on the grounds *inter alia* that state statutes (*i.e.*, Los Angeles Municipal Code, Ordinance Section 39.04; Section 57.10.23(a) and Sec. 57.04.03)[2] have been sustained

[1]For the purpose of 28 U. S. C. §1257(2) the Appellate Department of the Superior Court is the "highest Court of the state" *Edwards v. California*, 314 U. S. 160, 86 L. Ed. 119, 62 S. C. 164.

[2]A Municipal Ordinance is, of course, a "State Statute" *Reinman v. Little Rock, Arkansas*, 237 U. S. 171, 35 S. C. 511, 59 L. Ed. 900.

against a claim of unconstitutionality under the Federal Constitution. Other questions raised also involve federal constitutional questions and invoke the jurisdiction of this Court (See *infra*).

(i) Defendants were separately charged but jointly tried for violation of the above enumerated "Nuisance" and "fire" ordinances.

(ii) Judgment of the Appellate Department of the Superior Court affirming the convictions was rendered December 4, 1963 (See Appendices A and B). A petition for rehearing and/or Certification to the District Court of Appeal of the State of California was denied on the 12th day of December, 1963. The Notice of Appeal was filed in the Appellate Department of the Superior Court on February 20, 1964. An extension of time to file this jurisdictional statement was granted by the Appellate Department of the Superior Court to and including May 20, 1964, by Judge Frank G. Swain on April 16, 1964.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Codes, Section 1257 (2).

(iv) For case authority conferring jurisdiction upon this Court, see:

1. Appellate Jurisdiction: *New York Ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, 49 Supreme Court 61, 73 Law. Ed. 184, 187; *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 60 Supreme Court 431, 84 Law. Ed. 596, 127 A. L. R. 821; *Lambert v. Calif.*, 355 U. S. 225, 78 Supreme Court 240, 2 Law. Ed. 2d 228.

2. Generally as to subsidiary questions involving constitutional issues: *Scott v. Donald*, 165 U. S. 58, 170 Supreme Court 265, 41 Law. Ed. 632.

3. Knowledge and Notice: *Lambert v. California, supra.*

4. Search and Seizure: *Mapp v. Ohio,* 367 U. S. 643, 81 Supreme Court 1684, 6 Law. Ed. 2d 1081; *Marcus v. Property Search Warrants,* 367 U. S. 717, 81 Supreme Court 1708, 6 Law. Ed. 2d 1127.

5. Cruel and Unusual Punishment: *Robinson v. Calif.,* 370 U. S. 660, 82 Supreme Court 1417, 8 Law. Ed. 2d 758.

6. "Due Process" and "Equal Protections": All cases above cited, and *Palko v. Connecticut,* 302 U. S. 319, 58 Supreme Court 149, 82 Law. Ed. 288.

(v) Section 39.04 the Los Angeles Municipal Code, is found in Article IX of Chapter 3 of that Code and reads as follows:

> "No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water or filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly-breeding".

Section 57.10.23 (a), the Los Angeles Municipal Code is a part of Chapter V, Division 10 of that Code, and reads:

> "Every person owning or managing any building where people live, work or gather other than a dwelling, shall provide exit and directional signs as hereinafter specified . . . (a) unless otherwise clearly and unmistakenly indicated as an exit,

every exit door serving as a way of egress, placed over or adjacent thereto a sign bearing the word 'EXIT' in letters not less than 5 inches high. . . ."

Section 57.04.03 was at that time a part of Division 4 of the aforesaid Chapter (it was repealed July 6, 1963). It read:

"No person, without a valid Permit then in effect so to do: . . . [shall] establish, operate, maintain a theatre, motion picture theatre, and place of assemblage".

(c) The questions presented on appeal to this Court as presented in the Notice of Appeal are that Section 3904 of the Municipal Code is so vague and ambiguous as to deny due process of law in violation of Amendment XIV of the United States Constitution. Sections 57.10.23(a) and 57.04.03 are claimed to be invalid under Amendment Fourteenth of the United States Constitution in that they fail to include any "intent" or "notice" provisions, and further that these "fire ordinances" was shown by the evidence to be passed without notice of the requirements being given to the appellants who previous to the passage of said ordinances were licensed and regulated by the laws of the City of Los Angeles.

Further questions on appeal presented are that there was a mass arrest and search and seizure of evidence presented at the trial without warrant and this was a violation of the Fourteenth Amendment to the United States Constitution.

Cruel and unusual punishments were inflicted upon the appellants in violation of Amendments 8 and 14 of the United States Constitution, or in the alternative.

and conversely, the appellants were denied indirectly their right to a jury trial and due process of law, in violation of Amendments 6 and 14 in that by choosing to have a trial by jury they faced increased punishment over those who chose to enter a plea of "guilty" to the same offenses. It is further submitted in this connection that the action of the respondent, the State of California, through its agents, in refusing to waive a jury trial on its face and under the circumstances herein, was so harsh and oppressive as to deny appellants a fair trial and equal protections of the law in violation of the Fourteenth Amendment.

Final question presented to this Court is whether or not the procedures of the State of California which permit the trying of several different and unrelated offenses is so deficient on its face where it is applied in the instant case as to deprive the appellants of a fair trial and due process of law and/or their right to trial by jury in violation of Amendments VI and XIV.

Statement of the Case.

On September 30, 1961 appellant Schackman owned and operated an "arcade" on Main Street in the City of Los Angeles. Greenwald was his employee. Shackman had been operating the arcade for approximately two years prior to that date, under a regulatory Permit from the City of Los Angeles. Part of this operation was the showing of nude movies, commonly known as "Peep Shows." Early in 1961, the legislature of the State of California had passed a new "obscenity" law in conformity with the opinions of this Court. This law was to become effective on September 15, 1961. Prior to September 15, 1961, a meeting was held with the city officials including the City Attorney, Police De-

partment, and the Police Commission in which it was agreed that once the law became effective that the pictures shown could be deemed "obscene" under the new law, even though they were not so deemed under the old California law. In accordance with the plan formulated by the City Attorney's office, and the Police Department, the mass arrest and raid was made in the 19 arcades, including the appellant's. "25 persons were arrested at the time and complaints . . . . filed against all owners of record. . . ." [Ex. 27, p. 17] The events at appellant's premises are typical of the events at each and every other arcade. See testimony of L.A.P.D. officers McGann, R. T. 502, and Robert L. Smith, R. T. 370] These officers went into the appellant's arcade, established that there was "knowledge" of the contents of the films, and then proceeded to open up every machine booth forcibly, remove 25 reels more or less from these particular booths and systematically went through every door in the establishment, including a door leading to an adjoining barber-shop and into a store-room in the basement and confiscated over 600 reels of film from the establishment. The public were excluded from appellant's place of business. Squads of policemen, investigators, Firemen, photographers and the like descended upon Main Street like locusts and started to procure the evidence which they had already determined that they were doing to obtain. This amazing spectacle took place on one of the busiest thoroughfares in one of the largest cities in the United States. The businesses that were open to the public were forcibly closed. Members of the public were herded together and interrogated by the police officers. Some of the members of the public were permitted to go home; some were arrested.

Appellants thereafter were separately charged in identical complaints with violations of the state "obscenity" law and the Municipal ordinances referred to herein. Demurrers to the complaints were filed alleging a misjoinder of these offenses and denial of due process of law. At the time of trial, a motion for severance was made to sever the obscenity count from the Municipal ordinance on the grounds that such a joint trial could be prejudicial, a denial of due process and equal protections of the law, and in violation of the 14th amendment to the United States Constitution. The Demurrers were obviously overruled and the motions for severance denied. (See Docket entries of Clerk).

Prior to the commencement of the trial by jury, appellants attempted to waive trial by jury but were unable to accomplish since the prosecution demanded the jury trial. The appellants were thus subjected to the costs of the jury trial which extended over a period of approximately six weeks. The principle questions were questions of law. Also, prior to the commencement of the jury trial, the Court was requested to conduct a hearing in light of the contention of the defendants that all of the evidence obtained was obtained in violation of Amendment XIV to the Constitution. Because the Court did not know of any procedure by which this could be done, the request was denied with the result that the objections to the reception of the evidence were heard on "voir dire" outside of the presence of the jury during the course of the trial and in fact occupied about 75% of the trial time. Consistent and repeated objections to the admission of the evidence were on the basis of unlawful search and seizure were denied [See Rep. Tr. pp. 2-16; the Clerk's Docket, the

Appellants' Trial Briefs and Supplementary Trial Brief]. At page 756 of the Reporter's Transcript, the Court stated "the defendant's motion to suppress [the illegally received evidence] is denied." [See Also pp. 1048-1051 where the motions are renewed and deneid, again at p. 823].

Connection with the issue of a fair trial, equal protections and due process of law and cruel and unusual punishment was testimony of Burton Marks [R. T. 975]:

"I told Mr. Lindy that I discussed this situation with Larry Booth, the City Attorney, who was handling all of the arcade matters. Mr. Booth had informed me that of the approximate 19 arcades and 25 persons that had been arrested on September 30, 1961, the owners entered a plea of guilty in Division 20—this is the master calendar court —the City Attorney would then move to dismiss the case against the employees. The stipulation is that they plead guilty to Count One and Two of the complaint, the remaining counts would be dismissed and so would the case against the employees, and that it had been the custom in Division 20 to be a fine at about the most of $200, perhaps less, depending upon the circumstances.

"The City—I also told Mr. Lindy that Mr. Booth had informed me that if a plea of guilty was not entered, that the City Attorney's office would demand a jury trial and that they would not dismiss the case against any of the employees.

"I also informed Mr. Lindy that Mr. Booth had informed me that there had been two, out of approximately 17 cases, that had already come up,

that had not pleaded guilty, of these two they had gone to jury trial, they had been long jury trials, there had been convictions in both cases, and that the penalty imposed by the courts in the cases which had gone to trial had been substantially greater. And I believe that I told him that Mr. Booth had said there had been a jail sentence imposed."

Both of the appellants herein after the jury trial had six-month sentences imposed upon them for violation of the "obscenity" statute and for violation of count 2 the "nuisance" ordinance; to run concurrent. Excessive fines were imposed for the remaining counts on Mr. Schackman. Most of the testimony and argument in this trial revolved around the question of the validity and interpretation of the obscenity statute. The Appellate Department of the Superior Court although reversing the obscenity convictions (see Appendices A and B) failed and refused to reverse the other convictions. These convictions were inextricably tied in with the obscenity conviction and the evidence on the obscenity charges was such as to prejudice the jury with respect to the other counts. This argument was presented and rejected on motion before trial, at the time of the Appellate hearing and on Petition for a Rehearing.

Question of cruel and unusual punishment was raised in the appellant's opening brief (App. Op. Br. designation of error No. 5 "Cruel and Unusual Punishment was Inflicted"), and by Motions to the Appellate Department to hear additional evidence upon the question of the punishment imposed and the activities of the prosecuting officials. The motion to hear the additional evidence on the question of cruel and unusual punish-

ment was denied. (See Record of Appellate Court transmitted to this Court.)

The constitutionality of the "nuisance" ordinances was raised at trial by motion to dismiss and supported by trial briefs. The original trial brief alleged that the ordinances were ". . . unconstitutional and vague in violation of the due process clause of the California Constitution and Amendments 5 and 14 to the United States Constitution, in that they are so vague and indefinite that a person of ordinary and common intelligence could not know what was prohibited nor [were] any standard set forth by the sections of the Municipal Code to which they relate . . .".

The validity of these particular ordinances were also challenged on the grounds that they were "pre-empted by state law dealing generally with the abatement of nuisance in the state and which required "notice".[3]

In the Appellant's Supplementary Trial Brief it was stated

> "It is obvious by a perusal of the nuisance statutes in the Penal Code . . . that the Legislature intended to embrace a scheme which prevented anything injurious to health, indecent or offensive to the senses . . . to be prohibited. That this was intended to apply to cities as emphasized in Section 373 (a) where it is made the duty of the City Attorney of any city to prosecute under this section and also to give some sort of

[3]California Penal Code §373a provides, in part that "every person who maintains . . . a public nuisance . . . after reasonable notice, in writing, from a Health Officer or District Attorney or City Attorney . . . is guilty of a misdemeanor . . .". This Section supplies the requirement of "notice" the absence of which renders the Municipal Ordinance in question invalid.

written notice that the nuisance was in existence. Of course, the evidence will show that the City Attorney's Office and the Police Department of the City of Los Angeles had extensive and continuing notice of the 'nuisance' and no such notice was given to any of the Arcade owners, including the defendants.

"Counts III and IV dealing with clean and sanitary places of public assemblage seem to deal with the same subject matter. However, in those cases, the words 'good, clean and sanitary' are so vague and ambiguous that they are unconstitutional on the face. As a part of substantive due process of law, a criminal statute must be so definite and certain that it gives a fair warning to inform a person of ordinary or average intelligence of what acts it declares it to be prohibited and punishable. In other words, it must not be so phrased that a party might commit the offense not knowing that his act is included in the statutory prohibition . . ." (citing *People v. Boljat*, 36 Cal. App. 2d 644, 98 P. 2d 513 and *In re Peppers*, 189 Cal. 682, 209 Pac. 896).

On appeal appellants designated as "Error number 3" the denial of defendants' motion to dismiss Counts II, III and IV on the grounds of vagueness.

The constitutionality of the Fire Ordinances was raised on trial by similar motion. The basis for these objections was founded on the testimony of the prosecution witnesses on cross-examination. Captain Buxton of the Los Angeles Fire Department who noted the

Fire Ordinance violation, was questioned as follows [R. T. 685]:

> "Now, it is a fact, isn't it, Captain, that in order to obtain a license or permit to operate a place of public assemblage that the person must first acquire a Fire Department clearance or permit?" . . . "The witness: He must obtain a Fire Department clearance before the license is issued." "Q. by Mr. Marks: All right. Now, would the Fire Department issue a clearance if the regulations of the Fire Department of the Municipal Ordinances are not met?" "Answer. No."

One of the City Clerks testified [R. T. 849] as follows:

> "Q. So sometime before . . . . between 1958 and 1961 the procedure changed in the Clerk's office so that a person would have to obtain a fire permit in order to go into business? . . . A. That is correct." . . . "The ordinances became effective January 1st of 1960 and the first applications were taken, oh, about the third week of January . . . ." "Q. When these ordinances became effective in January of 1960, did your office then send any notice to licensees or permittees that fire permits were required? . . . A. No sir."

A requested instruction by the defendant which was not given read as follows:

> "The law does not contemplate punishing a person for failure to do an act which a person could not reasonably have anticipated that he was required to do. Thus, in Count VII, if you find that it was not reasonable to suppose that the de-

fendants could or should have known of the requirement that a fire permit be obtained under all the circumstances, they cannot be convicted of the charge alleged in Count VII."

On appeal the specification of error was raised as follows:

> "As to Count VII, particularly, and also Counts V and VI, defendant SCHACKMAN was not notified of the fact that a fire permit was required and this lack of knowledge is fatal to the Peoples' case (*Lambert v. California*, 355 U.S. 225, 2 L Ed 228, 78 S.C. 240)" (App. Op. Br. at p. 8).

It might be noted that the evidence of the "nuisance" dealt with the fact that after the mass arrest and raid police officers went into the defendants' establishment and by the use of ultra violet lamps were able to scrape off the walls of some of the projection booths "semen" stains. The presence of these semen stains or the fact that they were semens could not be detected without the use of highly scientific instruments and technical scientific analysis. Of course it was contended that this evidence was also a "fruit of the poisonous tree", *i.e.*, the evidence unlawfully seized by the mass raid and arrest. On appeal, error number 13 specified that "the evidence presented was unlawfully seized in violation of Article I, §19, California Constitution and U.S. Constitution Amendment XIV and therefore, inadmissible."

As heretofore stated the error of misjoinder of the offenses and the prejudicial effect thereof was presented to the trial court by demurrer and by motion to sever. On appeal, the overruling of the demurrer and

the denial of motion [for severance] was designated as error number 1. On petition for rehearing, after the obscenity Count had been reversed, the appellants pointed out to the Court

> "This abuse of administration of justice [prejudicial misjoinder] should not be countenanced by this Court. Furthermore, it is a question of substantial importance relating to the defendants that the court should not stand silent in the face of an accusation on appeal that the misjoinder was erroneous and not only erroneous, but prejudicial. The petition for rehearing then continues, citing *McElroy v. U.S.*, 164 U.S. 76, 17 S.C. 31, 33, 41 L Ed 355, for the proposition that 'The order of consolidation was not authorized by statute, and did not rest in mere discretion.' And that 'it would seem to us that in the very nature of things the consolidation of such separate unconnected charges for trial could not help but be prejudicial to either or both defendants.
>
> "The fact that *McElroy* talks about felonies only is irrelevant in the light of *Gideon v. Wainwright*, 9 L ed 2d 799, giving as a matter of 14th Amendment protections the right to counsel 'in all criminal prosecutions' and, . . .
>
> "When a defendant has been denied any essential element of a fair trial or due process even the broad saving provisions of harmless error provision of the State Constitution cannot remedy the vice and the judgment cannot stand. . . ."

In conclusion, appellants would point out that this is one of the most unusual cases to come before a State Court in California. It arises out of an over-zealous

endeavour of local officials to close down lawful businesses by any means and regardless of the cost. Commencing with an illegal raid and procuring of evidence. the prosecution was only stopped in this one instance from obtaining pleas of guilty and/or obtaining convictions on the "obscenity" charge by the dogged persistence of the appellants herein. Concerted effort was made by the prosecution to obtain pleas of guilty by threats of greater punishment and in fact they were able to manipulate the judges secured so that the appellants herein, by attempting to secure a trial indeed suffered the increased punishment for violation of minor offenses. Finally, the convictions were obtained not only with illegally seized evidence, but under unconstitutional ordinances. It is respectfully submitted that the Federal questions presented at trial on appeal and herein are substantial, particularly within the areas of 14th Amendment protections against unlawful search and seizures (*Mapp v. Ohio, supra*) and with relation to the extent of the constitutional requirements of "notice" and "knowledge" and under the standards laid down in the case of *Lambert v. California, supra*. The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

BURTON MARKS,
Attorney for Appellants.

APPENDIX A.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CR A 5272, Trial Court No. 15074.

People of the State of California, Plaintiff and Respondent, vs. Harry Schackman, et al, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Byron J. Walters, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment as to Count I made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed; the judgment is affirmed as to Counts II, V, VI and VII; the appeal is dismissed as to counts III and IV; the appeal from order denying new trial is dismissed.

MEMO.

With respect to Count I, alleged exhibition of obscene matter in violation of section 311.2 Penal Code, we are bound by the holding in *Zeitlin v. Arnebergh* (1963) 59 A.C. 930 that only "hard-core pornography" is prohibited. Having made the required independent

examination of the evidence we find that the material exhibited was not hard-core pornography within the holding of that case. With respect to Counts III and IV see section 654 Penal Code.

Dated: Dec. 4, 1963.

BY THE COURT.
HULS
Acting Presiding Judge.
SMITH
Judge.
KINCAID
Judge.

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19..... and now remaining of record in this Court.

WITNESS my hand and seal of the Court, affixed this ..... day of ....., 19 .....

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles.

By ..... Deputy.

APPENDIX B.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CB A 5271, Trial Court No. 150398.

People of the State of California, Plaintiff and Respondent, vs. Harry Greenwald, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Byron J. Walters, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment as to Count I made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed; the judgment as to Count II is affirmed. The appeal from order denying new trial is dismissed.

MEMO.

With respect to Count I, alleged exhibition of obscene matter in violation of section 311.2 Penal Code, we are bound by the holding in *Zeitlin v. Arnebergh* (1963) 59 A.C. 930 that only "hard-core pornography" is prohibited. Having made the required independent examination of the evidence we find that the

material exhibited was not hard-core pornography within the holding of that case.

Dated: Dec. 4, 1963.

BY THE COURT:
HULS
Judge.
SMITH
Acting Presiding Judge.
KINCAID
Judge.

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the ..... original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19....., and now remaining of record in this Court.

WITNESS my hand and seal of the Court, affixed this ..... day of ....., 19.....

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles.

By ..... Deputy.